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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No.——

AHTO WALTER, LUCY A. WALTER
and EWEN DUFF WALTER,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

**

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the case of United States of America, Plaintiff-Appellee, versus Fishing Vessel MARY ANN, her engines, machinery, masts, anchors, etc., in rem, and AHTO WALTER, LUCY A. WALTER, and EWEN DUFF WALTER, in personam, (No. 71-1640) on July 27, 1972.

Citations to Opinions Below

The opinion of the United States District Court, Southern District of Texas, Houston Division is printed in Appendix B hereto and the opinion of the United States Court of Appeals for the Fifth Circuit is printed in Appendix C hereto.

Jurisdiction

The judgment of the United States Court of Appeals for the

Fifth Circuit was entered July 27, 1972. Rehearing and rehearing en banc was denied by order entered September 8, 1972. Appendix C, *infra.* The jurisdiction of this Court is invoked under 28 U.S.C., § 1254 (1) and Rule 19 (1b) of the Rules of this Court.

Questions Presented

1) Were the dictates of the Fish and Wildlife Act, 16 U.S.C. § 742, which were incorporated in the loan from United States Government to Ahto Walter, given proper consideration by the lower courts in reaching the decision that United States Government owed no duty to Ahto Walter to collect certain insurance proceeds and apply the same to Ahto Walter's indebetedness?

2) Did the United States Government, by its failure to properly proceed to collect certain insurance proceeds to which it was solely entitled by the terms of the insurance contract procured by Ahto Walter at United States Government's demand constitute a breach of its duty to Ahto Walter under the loan agreement and the preferred ship mortgage taken by United States Government as Security?

3) Was the Court of Appeals led astray in its decision upholding the decision of the District Court when it misread the chronology of events and stated in its opinion that the United States declined to sue on the insurance policy on the ground that Ahto Walter "was not then in default" and stated that "Ahto Walter subsequently defaulted in making payments to the United States" when a reading of the record reveals that Walter *was* in default under the terms of the preferred ship mortgage at the time United States Government was requested to collect the insurance proceeds and apply them against the mortgage indebtedness?

4) Can the stated public purpose of a United States Statute (The Fish and Wildlife Act, 16 U.S.C. § 742) be effectively subverted by administrative action and inaction of the United States Department of Justice in failing to take all other action

available to it rather than foreclosure of a preferred ship mortgage so as not to put Ahto Walter out of the very business (fishing) that Congress established the loan fund to enable Ahto Walter and others similarly situated to go into?

Statute Involved

The statute involved is 16 U.S.C. § 742 (a) and (c) and the pertinent text is set forth in Appendix A hereto.

Statement

The factual situation out of which the questions for which review is sought can be simply stated in bare-bones style as follows:

Petitioner Ahto Walter, with vast ocean-wide experience in fishing, applied for and received a loan from the United States Government under the loan fund established by the United States Congress in the Fish and Wildlife Act, 16 U.S.C. § 742 (c) as amended in 1965. The loan was for approximately 50% of the value of the ship and its gear. Ahto Walter supplied in cash, personal labor and knowledge the balance. The United States Government required Lucy A. Walter and Ewen Duff Walter to guarantee the loan as well as taking a preferred ship mortgage on the vessel. There was built by Ahto Walter a fishing factory ship appraised by the United States Government at a value of approximately $800,000.00.

Upon substantial completion of the ship, while moving the ship from one location to another for final completion, an accident occurred resulting in damages to the ship and gear of approximately $80,000.00. Ahto Walter expended the balance of funds available to him (which were to provide initial operating capital) to effect immediate repairs.

A builders risk policy (all-risks) had been required by the United States Government, paid for by Ahto Walter, and issued solely in the name of the United States. A second builders risk policy naming Ahto Walter as loss payee was also obtained by Ahto Walter and paid for by him.

After the repairs were made and the full cost thereof ascertained, Ahto Walter requested United States Government to collect on its policy (which had been issued through the agency selected by United States Government) and apply the proceeds against his indebtedness and against the ship mortgage as provided in said mortgage. United States Government refused to do so although fully aware that Ahto Walter was now dangerously short of operating funds with which to commence the business for which the loan had been made.

Thereafter, Ahto Walter was able to make only one short fishing trip with the ship (which resulted in no profit) before the United States Government ordered him (under threat of arrest) to return the ship to U.S. waters and then to Houston, Texas where the ship was shortly arrested and sold and a deficiency judgment taken against Ahto Walter, his wife, Lucy A. Walter, and his son Ewen Duff Walter. These actions were taken by United States Government for alleged defaults by Ahto Walter under the preferred ship mortgage.

The United States Government was the sole bidder at the foreclosure sale for a price of $250,000.00; this amount, after deduction of costs of sale was to be applied against an indebtedness of approximately $450,000.00 to the United States Government. The ship was subsequently resold by the United States Government for an amount in excess of the bid price; it is in operation for a new owner and the Walter family is wiped out financially.

Reasons for Granting the Writ

This appears to be a case of first impression on the construction of a federal statute (16 U.S.C. § 742) and the Congressional policy enunciated therein and as such constitutes an important question of federal law which has not been, but should be, settled by this Court. (Supreme Court Rule 19 [1b]).

Although raised by counsel for Petitioners in both the District Court and the Court of Appeals below, the question of

the effect of the public policy to aid fishermen and the United States fishing industry as expressed by the United States Congress in establishing a loan fund to aid in the financing of United States built fishing vessels and the encouragement of a United States based viable fishing industry, as overriding the technical legal language contained in the security instrument (the preferred ship mortgage) was not even considered by the District Court in its Memorandum Opinion and was dismissed with little comment by the Court of Appeals in its opinion.

We urge however, that the United States Congress did not intend to mislead innocent or naive fishermen by its announced policy contained in 16 U.S.C. § 742 (a) nor did it intend such expression of policy to be a nullity.

Both of the courts below addressed themselves in their opinions solely to the construction of the technical legal language of the security instrument and the construction, as a matter of insurance law, of the effect of the mortgagee clause on the rights and responsibilities of the United States Government and Ahto Walter. Nowhere is found any discussion of the equitable and moral questions involved nor of the legal questions involved in interpreting a lender's legal documents, drawn by the lender, and enforced by the lender in obvious variance with the public policy announced by the United States Congress in 16 U.S.C. § 742 (a).

We do not here, in this Petition, enter into the numerous citations of court decisions with respect to the interpretation of legal documentation and courses of conduct between private lenders and borrowers and the basic contract and equitable principles applying thereto. *A fortiori*, such principles must apply to contracts and courses of conduct between a private citizen and his government.

We direct this Court's attention to the chronology of events as briefly set forth in the District Court's memorandum opinion annexed hereto as Appendix B. We also direct this Court's attention to the fact that nowhere in either of the opinions of the lower courts is there any reference to borrower Ahto

Walter's lack of good faith or to any attempt on his part to evade his legal and moral obligations, to the United States Government under his loan agreement. We find no such reference because no such accusation could be made. Ahto Walter, a naturalized citizen of the United States, was proud and pleased that his adopted country, through its Government, would enable him, through a loan, to build a modern fishing vessel in a United States shipyard and offer his knowledge and skills in helping to build a viable United States fishery as Congress had announced it desired as a matter of public policy.

Even though the enabling legislation permitted loans of up to 80% of the value of the ship and its gear, with the borrower investing only 20%, Ahto Walter was proud to put up 50% of the cost, which involved his mortgaging and borrowing against everything he owned, his home, his life insurance policies, and all of his cash.

It therefore came as a distinct shock when, before he could even get started in business and earning the money out of which he intended to repay his Government for its loan, and while only some $75,000.00 in arrears under the loan agreement, which he felt was fully covered by the insurance policy whose proceeds could only be collected by United States Government, his benevolent Government put him out of business, sold his business out from under him, and then demanded more.

We urge that the failure of the Administrative branch of the Federal Government – and to date, the Judicial branch – to acknowledge that the public policy of the Legislative branch as expressed in a Federal Statute must be considered in interpreting legal terminology contained in legal documents supposedly drawn in execution of such policy, constitutes such an important question of federal law as requires this Court's consideration.

Conclusion

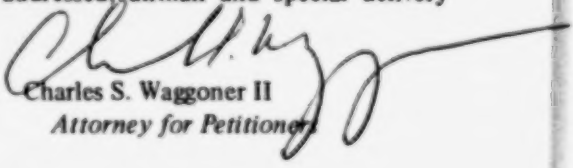
For the foregoing reasons it is respectfully submitted that

this petition for a writ of certiorari should be granted.

Charles S. Waggoner II
Attorney for Petitioners

Certificate of Service

I hereby certify that on December 6, 1972, three copies of the foregoing Petition for Writ of Certiorari were served on the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, by depositing same in the United States Mail, correctly addressed, airmail and special delivery postage prepaid.



Charles S. Waggoner II
Attorney for Petitioners

APPENDIX A

Statute 16 U.S.C. § 742 (a) & (c)

a. Declaration of Policy

The Congress declares that the fish, shellfish, and wildlife resources of the Nation make a material contribution to our national economy and food supply, as well as a material contribution to the health, recreation, and well-being of our citizens; that such resources are a living, renewable form of national wealth that is capable of being maintained and greatly increased with proper management, but equally capable of destruction if neglected or unwisely exploited; that such resources afford outdoor recreation throughout the Nation and provide employment, directly or indirectly, to a substantial number of citizens; that the fishing industries strengthen the defense of the United States through the provision of a trained seafaring citizenry and action-ready fleets of seaworthy vessels; that the training and sport afforded by fish and wildlife resources strengthen the national defense by contributing to the general health and physical fitness of millions of citizens; and that properly developed, such fish and wildlife resources are capable of steadily increasing these valuable contributions to the life of the Nation.

The Congress further declares that the fishing industry, in its several branches, can prosper and thus fulfill its proper function in national life only if certain fundamental needs are satisifed by means that are consistent with the public interest and in accord with constitutional functions of governments. Among these needs are:

(1) Freedom of enterprise–freedom to develop new areas, methods, products, and markets in accordance with sound economic principles, as well as freedom from unnecessary administrative or legal restrictions that unreasonably conflict with or ignore economic needs;

(2) Protection of opportunity–maintenance of an economic

atmosphere in which domestic production and processing can prosper; protection from subsidized competing products; protection of opportunity to fish on the high seas in accordance with international law;

(3) Assistance–assistance consistent with that provided by the Government for industry generally, such as is involved in promoting good industrial relations, fair trade standards, harmonious labor relations, better health standards and sanitation; and including, but not limited to–

(a) services to provide current information on production and trade, market promotion and development, and an extension service, (b) research services for economic and technologic development and resource conservation, and

(c) resource management to assure the maximum sustainable production for the fisheries.

The Congress further declares that the provisions of sections 742a–742j of this title are necessary in order to accomplish the objective of proper resource development, and that such sections shall be administered with due regard to the inherent right of every citizen and resident of the United States to engage in fishing for his own pleasure, enjoyment, and betterment, and with the intent of maintaining and increasing the public opportunities for recreational use of our fish and wildlife resources, and stimulating the development of a strong, prosperous, and thriving fishery and fish processing industry. Aug. 8, 1956, c 1036 § 2, 70 Stat. 1119.

c. Fisheries Loan fund; Interest payments on appropriations available as capital to the fund less average undispersed cash balance

There is created a fisheries loan fund, which shall be used by the Secretary as a revolving fund to make loans for financing and refinancing under this section. Any funds received by the Secretary on or before June 30, 1980, in payment of principal or interest on any loans so made shall be deposited in the fund and be available for making additional loans under this section.

Appendix A

The Secretary shall pay from the fund into the miscellaneous receipts of the Treasury, at the close of each fiscal year, interest on the cumulative amount of appropriations available as capital to the fund from and after July 1, 1965, less the average undispersed cash balance in the fund during the year. The rate of such interest shall be determined by the Secretary of the Treasury, taking into consideration the average market yield during the month preceding each fiscal year on outstanding Treasury obligations of maturity comparable to the average maturity of loans made from the fund. Interest payments may be deferred with the approval of the Secretary of the Treasury, but any interest payments so deferred shall themselves bear interest. Any funds received in the fisheries loan fund after June 30, 1980, and any balance remaining therein at the close June 30, 1980 (at which time the fund shall cease to exist), shall be covered into the Treasury as miscellaneous receipts. There is authorized to be appropriated to the fisheries loan fund the sum of $20,000,000 to provide initial capital.

Appendix B

UNITED STATES DISTRICT COURT
Southern District of Texas
Houston Division

Civil Action
No. 69-H-31

UNITED STATES OF AMERICA
v.
Fishing Vessel MARY ANN, her
engines, machinery, masts,
anchors, etc., *in rem*
and
AHTO WALTER, LUCY A. WALTER,
AND EWEN DUFF WALTER,
in personam

MEMORANDUM AND ORDER

The plaintiff, United States of America, brought this action to recover on a promissory note, signed by Ahto Walter and his wife, Lucy A. Walter, and on a guarantee agreement, executed by Ewen Duff Walter, and to foreclose on a First Preferred Ship Mortgage on the note's collateral, the fishing vessel MARY ANN. Lucy A. Walter and Ewen Duff Walter have filed a motion to dismiss this case as against them for lack of jurisdiction. Ahto Walter has filed a counterclaim against the United States of America, alleging that his inability to meet his mortgage obligations was caused by the breach by the United States of America of its contractual obligations. Upon stipulated and undisputed facts, the United States of America and Ahto Walter have filed cross-motions for summary judgment, pursuant to Rule 56, F.R.C.P.

This court has full and complete jurisdiction over the subject matter involved herein and the parties hereto, except the

defendant Lucy A. Walter, as she was never served with summons or citation herein. Accordingly, defendant Lucy A. Walter should be dismissed from this case, but the motion to dismiss for lack of jurisdiction should be denied in all other respects.

The note, mortgage and guarantee agreement referred to in the introductory paragraph of this Memorandum and Order were made and executed on December 15, 1966, in return for a loan by the United States of America in the amount of $397,506.00, which was to be used in the purchase of the MARY ANN.

Article I, section 2 of the mortgage provides that the "Mortgagor will, at all times and at its own expense, keep the Vessel insured" with coverage "fully and adequately protecting the Vessel and the Mortgagee's interest therein." Insurance was to be taken out in name of the Mortgagor and Mortgagee as their interest may appear" and and all losses were to be "payable to the Mortgagee." In December of 1966, in compliance with these terms of the mortgage, Ahto Walter obtained a builder's risk policy, No. HEE-1248, which was issued by certain Pennsylvania and English underwriters. This policy designates Ahto Walter as the named insured and designates the United States of America as the sole loss payee. The mortgagee clause of the policy contains a standard or union mortgage clause endorsement, which provides that the interest of the United States of America shall not be impaired or invalidated by any act or neglect of Ahto Walter, the named assured, or the failure on his part to comply with any warranty or condition over which the United States of America has control but has not exercised such control.

On April 5, 1967 the MARY ANN capsized in Bayou La Fourche near Thibodeaux, Louisiana. Ahto Walter, at his own expense in the amount of $77,065.95, salvaged and restored the MARY ANN to her former condition.

Ahto Walter made a claim under the builder's risk policy to obtain proceeds to reimburse him for his expenditures. The

United States of America also asserted a claim under this policy. Both claims were denied by the underwriters.

In November of 1967, Ahto Walter requested the Government, as the sole loss payee, to commence suit under the policy. He offered to join in the suit as co-plaintiff.

On December 19, 1967, before an answer was received from the Government, Ahto Walter brought suit in Louisiana for the same loss, under another builder's risk policy, number HE3-2517, which was issued by New Jersey underwriters (*Walter* v. *Marine Office of America*, et al, E.D. La., Civil Action No. 67-1849-D).

By letter dated January 26, 1968, the United States responded to Mr. Walter's earlier request concerning suit against the Pennsylvania and English underwriters under policy HEE-1248. The Department of Justice declined to bring suit but authorized Ahto Walter to sue "in the name of the United States of America" under the basic provisions of the policy. Suit was not authorized, however, against the Pennsylvania and English underwriters under the union mortgage clause endorsement.

On October 22, 1968, after settlement negotiations proved to be unsuccessful and after the United States of America, mortgagee, declined to file a lawsuit against The Insurance Company of the State of Pennsylvania, Ahto Walter, as the named assured in policy HEE-1248 issued by The Insurance Company of the State of Pennsylvania, filed a motion for leave to file an Amended Complaint to include this insurance company in that suit. Pursuant to leave of court, granted on November 22, 1968, Ahto Walter did file an amended complaint in the Louisiana litigation against the Pennsylvania underwriters. He alleged a cause of action only on his behalf and did not exercise the authority previously granted to him to allege a cause of action in the name of the United States of America.

On January 8, 1969 the United States of America withdrew Ahto Walter's unexercised authority to bring suit in its name

under the basic provisions of policy No. HEE-1248. Thereafter, on July 23, 1969 the United States of America intervened, as mortgagee, in the Louisiana Litigation to assert a cause of action under policy HEE-1248.

On June 15, 1967 the first payment of principal in the sum of $10,193.00 plus interest on the note was due. Thereafter the note payments were due quarterly. Prior to November 1, 1968 Ahto Walter and his wife, Lucy A. Walter, failed to make payments on the note. In fact, on November 1, 1968 all of the principal amount of the note ($397,506.00) remained unpaid. Thus, the United States of America declared the note and the mortgage to be in default on November, 1, 1968. The present suit on the note, guaranty and mortgage was commenced on January 13, 1969.

In the fourth defense and Ahto Walter's counter-claim, it is asserted that Ahto Walter's inability to continue to meet his obligations under the note and mortgage agreement were caused by the refusal of the United States of America to proceed promptly against the underwriters in policy No. HEE-1248 to recover proceeds payable thereunder and to apply such proceeds to reduce the mortgaged indebtedness or to pay these funds directly to Mr. Walter as reimbursement for the expenditures incurred by him in the salvage repair and restoration of the MARY ANN. He alleges that at a time when he was unable to carry the additional financial burden of salvage, restoration and repair expenses and at the same time meet his obligations under the mortgage, the United States of America deliberately refused to file a lawsuit against the insurance companies for proceeds available as collateral security. Mr. Walter asserts that this refusal was wrongful and constituted a breach of the mortgage contract.

The rights of the defendants against the Pennsylvania and English underwriters under the basic terms of the policy No. HEE-1248 were not impaired by the refusal of the United States of America to file suit against the insurers in that policy. Ahto Walter, and not the United States of America, paid for the

repairs. The United States' security interest, the MARY ANN, had been fully restored, when Walter was declared to be in default–five days later government filed foreclosure proceedings–ignoring his previous plea to collect on the insurance policy, and Mr. Walter had not yet been declared to be in default with respect to the note and the mortgage. Under these circumstances, the court feels that the United States of America did cooperate fully with Mr. Walter in his efforts to collect the insurance. As mentioned earlier in its letter of January 26, 1968, the United States of America authorized Mr. Walter to sue in the name of the United States of America under the basic provisions of the policy, under the following conditions:

> that he agrees to absorb all of the court costs and expenses of the litigation. In addition, we would require Mr. Walter to agree that no proceeds for any recovery will be paid over to him until the Department of Justice has been satisfied that (1) either the repair liens have been previously discharged or the proceeds will be used to accomplish such discharges, and (2) either payments under the preferred ship's mortgage are not in default or the proceeds will be used to cure such default. Mr. Walter is also requested to acknowledge that nothing in such an agreement would impair any rights of the United States, under the preferred ship's mortgage. Finally, prior to filing any pleadings, documents, memoranda of law or briefs with the court on behalf of the Government, they would first have to be approved by this office and signed by the United States Attorney for the district where suit is brought.

The court does not consider these conditions too onerous or unreasonable, and, as noted earlier, Ahto Walter never exercised this authority. The United States of America was not required to do more.

The court also has concluded that the defendants in the original action do not have, and never have had, any rights under the Union Mortgage Clause endorsement to policy No.

HEE-1248. Some authorities regard such an endorsement as constituting a "separate contract of insurance with the mortgagee" (*Home Ins. Co.* v. *Currie*, 54 F. 2d 203, 204 (5th Cir. 1931); see 11 Couch on Insurance 2d, §42:694 (Anderson ed. 1963); 5A Appleman, Insurance Law and Practice §3401 (1970)). Other authorities regard the endorsement as creating only an "independent cause of action for a mortgagee third party beneficiary of the insurance policy (*Walker* v. *Queen Ins. Co., supra* at p. 163, 134 S.E. at pp. 269-70. Regardless of how it is characterized, the endorsement is designed "purely to protect the mortgagee's interest" against wrongdoing on the part of the mortgagor (5A Appleman, Insurance Law and Practice §3405 (1970)). The mortgagor acquires no rights under the union mortgage clause as a third party beneficiary (see, 18 Couch on Insurance 2d, §74:344 (Anderson ed. 1968); *Walker* v. *Queen Ins. Co., supra; McKay* v. *National Union Fire Ins. Co.*, 182 Minn. 378, 234 N.W. 589 (1931); *Lett* v. *Guardian Fire Ins. Co.*, 125 N.Y. 82, 25 N.E. 1088 (1890); Annotation, *Rights as between mortgagor and insurance company where policy avoided as to mortgagor but not to mortgagee*, 52 A.L.R. 278 (1928)). Although the rights of the United States of America in the standard mortgage clause endorsement may have been assignable to the defendants, no such assignment was made. Furthermore, the doctrine of legal subrogation is simply not applicable since it covers only those instances where one party pays a debt for which another is primarily answerable, and in the circumstances in this case Ahto Walter, and not the United States of America, was primarily responsible, under the terms of the mortgage agreement, to pay for the necessary repairs. Only if the United States of America had been primarily responsible for making the repairs would Ahto Walter's paying for same entitle him to subrogation to the United States of America with respect to any proceeds payable under the union or standard endorsement. Since the defendants had no rights under the union or standard mortgage clause endorsement, the United States of America, by declining to sue or authorize suit in January of 1968 against the Pennsylvania and English underwriters under the standard or union mortgage clause

endorsement to policy No. HEE-1248, caused no cause of action to arise in favor of the defendants.

By reason of the foregoing, the fourth defense to the suit of the United States of America and Ahto Walter's counterclaim must fail, and, upon the stipulated facts, the United States of America is entitled to judgment on its action. The sole remaining matter, then, is the determination of appropriate damages.

The record reflects the following:

1. On November 1, 1968, all of the principal amount of the Note, namely $397,506.00, remained unpaid.

2. By November 1, 1968, the United States of America had expended, pursuant to the terms and conditions of the note and Mortgage, an additional $15,213.38 for preservation and protection of the MARY ANN and had not been reimbursed for that sum.

3. On November 1, 1968, accrued simple interest at 6% on the sums indicated in paragraph 1 and 2 above amounted to $18,169.99.

4. Between September 27, 1968, and April 9, 1969, the United States expended, pursuant to the terms and conditions of the Note and Mortgage, an additional $9,854.08 for preservation and protection of the MARY ANN and has not been reimbursed for that sum.

5. Between September 27, 1968, and April 9, 1969, Ahto Walter became entitled to a total credit of $11,271.05 resulting from a refund of some moneys expended by the United States of America for preservation and protection of the MARY ANN.

6. On April 9, 1969, accrued simple interest at 6% on the sums indicated in paragraphs, 1, 2, 3 and 4 above, after the sum indicated in paragraph 5 above had been taken into account, amounted to $11,364.43.

7. The vessel, MARY ANN, was sold at an interlocutory public auction on April 9, 1969 for $250,000.00.

8. The Marshal's expenses from the sale of the MARY ANN amounted to $3,862.21.

9. On November 5, 1969, this court entered an interlocutory order, without prejudice to the defendants' defenses and counterclaim, applying the net proceeds from the sale of the MARY ANN against the outstanding indebtedness of Ahto Walter. The judgment recited that "the United States of America recover from Ahto Walter the sum of $440,836.83 with interest at 6% per annum on $429,472.40 from April 9, 1969, until paid." Between April 9 and the date of interlocutory decree was entered, November 5, interest at 6% per annum ($70.61 per diem) on $429,472.40 amounted to $14,828.10, which when added to $440,836.83 produced a total indebtedness of $455,664.93. The gross proceeds from the sale of the MARY ANN amounted to $250,000.00. Deducting the Marshal's costs of the sale, $3,862.21, leaves net proceeds of $246,137.79. Applying the net proceeds to the total indebtedness as of November 5 produces a deficiency of $209,527.14.

Accordingly, the United States of America is entitled to judgment in its favor against defendants in the amount of $209,527.14, with interest at the rate of 6% from November 5, 1969.

Counsel for the plaintiff, is directed to submit an appropriate judgment.

The clerk is directed to enter this Memorandum and Order and to provide counsel of record with true copies.

Signed at Houston, Texas, this 9th day of December, 1970.

Woodrow Seal
United States District Judge

APPENDIX B

District Court Opinion and Judgment

UNITED STATES DISTRICT COURT
Southern District of Texas
Houston Division

Civil Action
No. 69-H-31

UNITED STATES OF AMERICA
v.
Fishing Vessel MARY ANN, her
engines, machinery, masts,
anchors, etc., *in rem*,
and
AHTO WALTER, LUCY A. WALTER
AND EWEN DUFF WALTER,
in personam,

FINAL JUDGMENT

Pursuant to the Memorandum and Order of the court entered in this cause on December 9, 1970, and the Amendment thereto, it is hereby

ORDERED, ADJUDGED and DECREED that a deficiency judgment be entered in favor of the United States of America against the defendants Ahto Walter, Lucy A. Walter and Ewen Duff Walter in the amount of $209,527.14, with interest at the rate of 6 per cent from November 5, 1969, plus court costs incurred herein.

Signed at Houston, Texas this the 29th day of January, 1971.

Woodrow Seal
United States District Judge

Appendix B

UNITED STATES DISTRICT COURT
Southern District of Texas
Houston Division

Civil Action
No. 69-H-31

UNITED STATES OF AMERICA
v.
Fishing Vessel MARY ANN, her
engines, machinery, masts,
anchors, etc., *in rem*,
and
AHTO WALTER, LUCY A. WALTER
AND EWEN DUFF WALTER,
in personam,

ORDER

Having considered the motion of the plaintiff United States of America to reconsider and amend its Memorandum and Order of December 10, 1970 and the motion of defendants to set aside said Memorandum and Order, it is hereby ORDERED as follows:

(1) The first full paragraph on page two of the court's Memorandum and Order of December 10, 1970 is amended to read as follows:

This court has full and complete jurisdiction over the subject matter involved herein and the parties hereto, and the motion to dismiss for lack of jurisdiction should be denied in all respects.

(2) The last paragraph on page thirteen of the Memorandum and Order is amended to read as follows:

Accordingly, the United States of America is entitled to

judgement in its favor against defendants in the amount of $209,527.14 with interest at the rate of 6 percent from November 5, 1969, plus costs of court herein.

(3) The plaintiff's motion to reconsider and amend the Memorandum and Order is denied in all respects other than as granted in order (1) above.

(4) The defendants' motion to set aside Memorandum and Order is denied in all respects.

Signed at Houston, Texas this the 29th day of January, 1971.

Woodrow Seal
United States District Judge

APPENDIX C

In The
UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 71-1640

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

Fishing Vessel MARY ANN, her engines, machinery, masts, anchors, etc., *in rem*
and
AHTO WALTER, LUCY A. WALTER, EWEN DUFF WALTER,
in personam,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas

(July 27, 1972)

Before JONES, BELL and AINSWORTH, Circuit Judges.

JONES, Circuit Judge: Ahto Walter, one of the appellants, had built for him a vessel for fishing and freezing. To complete the vessel Walter borrowed $397,506 from the United States through the United States Bureau of Commercial Fisheries pursuant to the authorization of the Fish and Wildlife Act, 16 U.S.C.A. § § 742a-742k. To evidence the indebtedness Walter and his wife, Lucy A. Walter, gave a promissory note payable to the order of the United States of America and secured by a

preferred ship mortgage on the vessel under construction, the MARY ANN. Ewen Duff Walter, the son of Ahto Walter, gave a written guaranty of payment of the note. A builder's risk insurance policy was procured by Walter. The policy had a mortgagee loss payable clause endorsement attached, payable to the United States. Another builder's risk policy was procured by the shipyard, St. Charles Steel Works, Inc., in which Walter was named as a loss payee.

The MARY ANN capsized. Walter had the necessary repairs made at a cost of over seventy-seven thousand dollars. Walter filed claims with the insurance carriers which denied liability on several grounds but primarily on the asserted ground that the vessel did not capsize at the shipyard or while on a trial run. Walter requested the United States to bring an action upon the policy affording coverage to it, taking the position that the defenses which might be asserted against him could not prevail against the United States. It declined to sue on the asserted ground that Walter was not then in default. This Court has been told that an action has been brought on one or both policies in a court which is withholding its decision.

Walter subsequently defaulted in making payments to the United States. It foreclosed and purchased the MARY ANN at foreclosure sale. In the foreclosure Walter defended and counterclaimed, alleging that the United States had wrongfully refused to bring a suit on the insurance policy containing the loss payable mortgagee clause. The defense was rejected and a summary judgment against Walter was entered on the counterclaim.

Lucy A. Walter was made a party defendant in the foreclosure action by reason of her joinder in the execution of the promissory note. Ewen Duff Walter was made a party defendant in the foreclosure and a claim was made against him on the guaranty. Neither Lucy A. Walter nor Ewen Duff Walter was served with process in the action. Each of them had answered the complaint asserting defenses on the merits. The

district court held that Lucy A. Walter and Ewen Duff Walter had submitted themselves to the jurisdiction of the court. A deficiency judgment of more than two hundred thousand dollars and interest was entered against the Walters, husband, wife and son. All have appealed.

It is contended, in a number of different ways, that the refusal of the United States to pursue the insurance company under the provisions of the loss payable mortgagee clause was a breach of a duty owed by it to Walter. The mortgagee clause creates an independent agreement between the insurer and the mortgagee for the latter's benefit. *Levine v. Insurance Company of North America*, 5th Cir. 1971, 440 F. 2nd 679. The mortgagor has no rights under the mortgagee clause. 18 Couch Insurance 2nd Ed. 436 § 74:344. The United States did not owe any duty to Walter to bring an action against the insuror. Its refusal to bring such action did not change or modify the obligations of Walter to the United States. The Fish and Wildlife Act does not change this rule.

Although not specified as error, Walter complains of the sale of the MARY ANN for an amount in excess of its bid price at the foreclosure sale without crediting the difference upon the deficiency judgment. Aside from any procedural question, it must be held that the objection is without merit. This is not, it appears, one of those areas in which the compassionate generosity of a benign and benevolent sovereign is given effect.

Lucy A. Walter and Ewen Duff Walter contend that the district court had no jurisdiction over them. They raise two jurisdictional questions. In one of these they claim that this is an in rem proceeding in admiralty for the foreclosure of the lien of a preferred ship mortgage to which they are not parties upon a vessel in which they had no title or interest, and that joinder of the in personam claims against them is unauthorized and unavailing. The rules provide otherwise. Fed. Admiralty Rules, rules A, C(1), 28 U.S.C.A.; Fed. Rules, Civ. Proc. rules 18(a), 20(a), 28 U.S.C.A. Under the other jurisdictional claim it is urged that because there was no service of process there was no

jurisdiction. The governing principle is:

> "If a defendant proceeds *first* on the merits, as by a motion to dismiss for failure to state a claim or by an answer on the merits, and *thereafter* attempts to challenge jurisdiction over his person or improper venue, the challenge should fail; it comes too late, and has not been made in the manner prescribed in Rule 12." 2A Moore's Federal Practice, 2d Ed. 2322 ¶ 12.12.

The foregoing was quoted with approval and applied by this Court in *Stavang v. American Potash and Chemical Corporation*, 5th Cir. 1965, 344 F.2nd 117. See 5 Wright and Miller, Federal Practice and Procedure 849 et seq., § 1390-1391.

No error appearing, the judgment of the district court is

AFFIRMED.

Appendix C

In The
UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 71-1640

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

Fishing Vessel MARY ANN, her
engines, machinery, masts,
anchors, etc., *in rem*
and
AHTO WALTER, LUCY WALTER,
EWEN DUFF WALTER,
in personam,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING AND PETITION
FOR REHEARING EN BANC
(Opinion July 27, 1972, 5 Cir., 1972. F. 2d).

(September 8, 1972)

Appendix C

Before JONES, BELL and AINSWORTH,
Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.